Amalgamated Transit Union, Local Union No. 1433, AFL–CIO (Veolia Transportation Services, Inc., Phoenix Division) *and* Charles Weigand. Case 28–CB–078377

February 12, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On November 28, 2012, Administrative Law Judge Keltner W. Locke issued the attached decision. The Charging Party filed exceptions and a supporting brief and the Respondent filed cross-exceptions and a supporting brief. Both parties filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions as modified[1] and to adopt his recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Amalgamated Transit Union, Local Union No. 1433, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees that they will receive less favorable representation because they exercised their right to refrain from participating in a strike.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its offices and meeting halls in Phoenix, Arizona, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

Within 14 days after service by the Region, deliver to the Regional Director for Region 28 signed copies of the notice in sufficient number for posting by the Employer at its Phoenix, Arizona facility, if it wishes, in all places where notices to employees are customarily posted.

Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 12, 2014

Mark Gaston Pearce, Chairman

[1] In affirming the judge's finding that the Respondent did not violate the Act by failing to remove certain comments from its Facebook page, we find it unnecessary to rely on the judge's application of the Communications Decency Act, 47 U.S.C. § 230 (CDA). Chairman Pearce and Member Hirozawa find that the comments were not 8(b)(1)(A) threats, and further find it significant that the individuals who posted them were neither alleged nor found to be agents of the Respondent. Member Miscimarra relies solely on the latter justification (the fact that the individuals who posted the comments were neither alleged nor found to be agents of the Respondent). Because the comments included references to physical violence (i.e., suggesting that a fellow union member would get "2 black eyes" if he crossed the picket line, and asking if members could "bring Molotov Cocktails this time" in response to the Respondent's statement that it knew where the "scabs" were housed), Member Miscimarra does not agree that the comments would have been permissible under Sec. 8(b)(1)(A) even if made by agents of the Respondent Union, and he does not join in this aspect of the majority's opinion.

For the reasons stated by the judge, we affirm his dismissal of the allegation that the Union threatened unspecified reprisals in response to an unknown member's providing the Charging Party with printouts of Union Facebook pages to give to the Board. The Charging Party contends in his exceptions that the Respondent's threat to deactivate its Facebook page constituted a threat of reprisal and the actual deactivation constituted a reprisal. We reject this contention. The General Counsel neither alleged nor litigated that conduct as a threat or act of reprisal. See *P&C Food Markets, Inc.*, 282 NLRB 894, 896 fn. 8 (1987) (Board declined to consider union's exception because conduct was neither alleged in complaint nor litigated before the judge).

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten that you will receive less favorable representation because you exercise your right to refrain from participating in a strike.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

AMALGAMATED TRANSIT UNION, LOCAL UNION NO. 1433, AFL–CIO

Johannes Lauterborne, Esq. and *Eva Herrera, Esq.,* for the Acting General Counsel.
Michael J. Keenan, Esq., for the Respondent.
Charles Weigand, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Because of Section 230 of the Communications Decency Act of 1996, the Government may not hold Respondent liable for comments which union members posted on its Facebook page. However, Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) because of statements its agents made on the picket line.

Procedural History

This case began on April 6, 2012, when Charles Weigand, an individual (the Charging Party), filed the initial unfair labor practice charge, which was docketed as Case 28–CB–78377. The Respondent, Amalgamated Transit Union, Local Union No. 1433, AFL–CIO (referred to below as Respondent or the Union), received service of the charge on about April 9, 2012.

After an investigation, the Regional Director for Region 28 of the National Labor Relations Board (the Board), on behalf of the Board's Acting General Counsel, issued a complaint. Respondent filed a timely answer.

On September 11, 2012, a hearing opened before me in Phoenix, Arizona. On that date and the next two, the parties presented evidence. The hearing closed on September 13, 2012. Thereafter, the parties filed briefs.

Admitted Allegations

Based on admissions in Respondent's answer, I find that the Acting General Counsel has proven the allegations raised in complaint paragraphs 1, 2(a), (c), and (d), (3), and 5(a), (b), and (c). Therefore, I conclude that the unfair labor practice charge was filed and served as alleged.

Further, based on those admissions, I conclude that Respondent is a labor organization within the meaning of Section 2(5) of the Act and that it is the exclusive representative, within the meaning of Section 9(a) of the Act, of a unit of employees of Veolia Transportation Services, Inc.—Phoenix Division (the Employer), an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and which meets the Board's standards for the assertion of its jurisdiction. Therefore, Respondent is subject to the Board's jurisdiction, which appropriately may be asserted.

Additionally, based on Respondent's admissions, I conclude that the bargaining unit it represents is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act. Specifically, that unit consists of the following:

> All full-time and part time bus operators employed by the Employer; excluding all other employees, office clerical employees, supervisors, dispatchers, and guards as defined in the Act.

The Employer has recognized Respondent as the exclusive representative of the employees in this unit since about 2001, and this recognition has been embodied in collective-bargaining agreements, the most recent of which is effective from March 15, 2012, to June 30, 2015.

Respondent's answer also admitted that the following individuals, which the complaint alleges to be its agents within the meaning of Section 2(13) of the Act, are its agents "for some purposes." Based on that admission and the record as a whole, I find that the following individuals are Respondent's agents: Bob Bean, president; Michael Cornelius, vice president; Dana Kraiza, recording secretary; and Frank Zuckerbrow, executive board officer.

Although Respondent's answer originally had admitted the agency status (for some purposes) of Lisa Pacheco-Estrada (which the complaint identified as a "strike team leader"), the Respondent amended its answer to deny this allegation. I conclude that the record is insufficient to establish that she was Respondent's agent.

At hearing, the Acting General Counsel amended complaint paragraph 4 to add the allegations that the following individuals were members of Respondent's executive board, strike team leaders, and Respondent's agents within the meaning of Section 2(13) of the Act: Dennis Paulson, Arturo Suastegui, Michael Riley, James Washington, Dwayne Handy, and Sebastran Aldama. Respondent has denied these allegations, so I will return to them later in this decision.

Contested Allegations

As described above, the Respondent represents a unit of bus drivers employed by Veolia Transportation Services, a private contractor that provides public bus services for the city of Phoenix, Arizona. In March 2012, the Union engaged in a 6-day strike. The Government alleges that Respondent made certain statements which restrained and coerced employees in the exercise of their right to refrain from engaging in this concerted activity by crossing the picket line and continuing to work.

Many of the statements which the Government alleges to be unlawful threats appeared solely on the Union's Facebook page. In general, however, the individuals who made the statements were not Respondent's officials and the Acting General Counsel does not allege them to be Respondent's agents. Rather, the Government seeks to impose liability by arguing that Respondent had a duty to disavow the statements but did not.

Such a "refusal-to-disavow" theory, applied to an Internet website, presents novel issues which implicate Section 230 of the Communications Decency Act of 1996 and the First Amendment. Therefore, it is particularly important that the reasoning here be explicit and transparent, so that it can be scrutinized on appeal. To assure that the Government's arguments are presented exactly, rather than muddied through paraphrase, I will quote, to a greater extent than usual, from the Acting General Counsel's posthearing brief.

Complaint Subparagraphs 6(a) and (b)

Complaint subparagraph 6(a) alleges that since about mid-January 2012, Respondent, on its social networking site (1) threatened employees with less favorable representation because employees refused to participate in Respondent's strike against the Employer; and (2) threatened employees with physical harm because employees refused to participate in Respondent's strike against the Employer. Complaint subparagraph 6(b) alleges that about mid-March 2012, on its social networking site, Respondent threatened employees with violence by the use of explosives because employees refused to participate in Respondent's strike against the Employer.[1] Respondent has denied these allegations.

The complaint's term, "social networking site," refers to the Respondent's Facebook page, which was administered by the Union's Vice President, Michael Cornelius. The Acting General Counsel's brief accurately describes the operation of this Facebook page as follows:

> To access Facebook initially, a user must log on to Facebook.com and create a Facebook profile. The user can then send an electronic "friend" request to other users or to a Facebook page. In the case of RFP [Respondent's Facebook Page], Cornelius accepted "friend" requests only from Respondent's members in good standing by checking the requests against Respondent's list of members in good standing. Cornelius also removed "friends" from RFP after the "friends" fell out of good standing, typically for failing to pay Respondent's dues, or after the "friends" resigned their membership with Respondent or ended their employment with the Employer. It sometimes took Cornelius one month or longer to delete "friends" from RFP, which meant that non-members of Respondent or members no longer employed by the Employer continued to have access to RFP during this time period.
>
> Once a "friend" of RFP logged in to RFP, the "friend" could post a message to RFP's "wall." All "friends" of RFP would be able to see this message, otherwise known as a "post." A "friend" of RFP could then click on the post's "like" button. In addition or in the alternative, a "friend" could write a message, otherwise known as a "comment," in response to the post. A "friend" also could click on the comment's "like" button. Once they logged in to RFP, all "friends" of RFP could see all the posts, in chronological order, on the RFP, the comments to these posts, and who authored both the posts and comments, as well as who "liked" a particular comment or post. Depending on the date of the post, a "friend" may need to scroll down the page of the computer screen until a particular post, and comments in response to that post, appear.

At hearing, the Government introduced into evidence extensive printouts of material which had appeared on Respondent's Facebook page. Because of the large volume of material, I asked the Acting General Counsel to identify in the posthearing brief exactly which statements on these printouts the Government alleged to violate the Act.

Often in unfair labor practice proceedings, a typical threat, which restrains and coerces employees in violation of Section 8(b)(1)(A), consists of a sentence or two. However, the Acting General Counsel's brief cited longer passages which more resembled conversations than soundbites. Specifically, the brief stated:

> On January 21, 2012, someone with the user name of Wade Zimmerman posted the following post to RFP:
>
> THINKING of crossing the line. THINK AGAIN!

[1] The allegation which now appears as complaint subpar. 6(b) originally was designated complaint subpar. 6(a)(3). Before hearing, the Acting General Counsel filed a Notice of Intent to Amend Complaint which changed the dates on which the conduct described in subpars. 6(a)(1) and (2) allegedly occurred. Originally, the complaint had alleged that this conduct took place sometime in mid-March 2012, but the amendment changed these allegations to mid-January. However, the amendment did not affect the date alleged for the conduct described in subpar. 6(a)(3), which remained sometime in mid-March 2012. Therefore, what had been subpar. 6(a)(3) became subpar. 6(b).

THINK about the future. When WE return, YOU will be gone. It is a fact that in union strikes across the nation that within six months after the strike ends that 90% of the workers that crossed the line are no longer employed there. You may lose a check or two now or risk losing it all later.

THINK of the cold shoulders, the negative attitudes, and don't make any mistakes because your former friends and co-workers will report you in a heartbeat.

THINK that Veolia will protect you? They will have less respect for you than we will after the way you rolled over for them.

THINK that the union will protect you. They may have to represent you, but will they give it 100%.

THINK of how your family and neighbors will feel when we hold a informational picket line outside YOUR HOUSE. YES we can, and YES we will.

THINK about your own self respect. I know that I won't respect you in the morning. Will you?

THINK ABOUT IT!

Sixteen comments were posted in response to the Zimmerman post. The last 10 comments posted were as follows:

Bill Spike @Jim can't afford to lose insurance I need eye injection each to save my eyesight cost is 3800.00 each time I go what do I do.

Jim Shaw You go get your eye injections and tell them that you are willing to pay at a reduced price. They will work with you. They will even take payments. Tell them that your are a bus operator on strike and they should have some sympathy. However, don't tell them that you are a sarcastic asshole. . . . they might just make you pay more! Ha Ha Ha. . . .)

Joaquin Dominguez If u cross bill you will lose your eyesight but from the 2 black eyes Lisa is gonna give u lol

Bill Spike Is that a threat or promise Joaquin

Jim Shaw Bill. . . . didn't you know. . . . Lisa will have you for lunch if so much as think about crossing? I PROMISE you that!

Barnell Uncleb Walker Better yet jim. . . . they will tell him to get da hell out . . . cuz they don't serve his kind . . . . lol

Jim Shaw Bill. . . . I wish you the best and I hope your eyes get better. Take care and do what you need to do and always remember. . . . veolia does not care about you. . . . We do!

Bill Spike Jim I have macula degeneration that's why I need injection which is 2000 a piece without insurance I can't afford it and I will lose eyesight

Atu Lisa Pacheco Estrada I have the right to remain silent, anything I say or do can and will affect in a Court of law. . . .

Bill Spike Hahahahaha lisa

On March 11, 2012, the second day of the strike, Cornelius posted the following post on [Respondent's Facebook page]:

We found them!! We found out where they are housing the scabs. We will be setting up lines at the hotel tomorrow. My friend at the PD asked if we can wait so they can have a unit out there and I told him yes. So we will put them up tomorrow afternoon.

In response to Cornelius's post, 13 comments were posted. The last of these comments, by someone with a user name of Patrick Geurs, posted on March 12, 2012, during the third day of the strike, was: "Can we bring the Molotov Cocktails this time?" Someone with the user name of Eddie Aucoin "liked" this comment.

The Acting General Counsel's brief did not identify any other statements which had appeared on Respondent's Facebook page as being part of the alleged violations. Therefore, I conclude that the Government relies only on the material quoted above to establish the violations alleged in complaint paragraphs 6(a)(1), (2), and (b).

Additionally, the legal argument section of the Acting General Counsel's brief further narrows the allegations. The brief states, in part:

> Respondent violated the Act by failing to disavow the following threat by Zimmerman: "THINK that the union will protect you. They may have to represent you, but will they give it 100%." The post was explicitly addressed to anyone who was thinking of crossing the picket line. This post unlawfully coerced employees, including Respondent's members, that Respondent would represent those who chose to work during a strike with less diligence than it would represent strikers. See, e.g., *Teamsters Local 298 (Schumacher Electric Corporation)*, 236 NLRB 428, 434 (1978).

Clearly, the Government relies upon this statement by Zimmerman as the basis for the allegation, in complaint subparagraph 6(a)(1), that Respondent threatened employees with less favorable representation because the employees refused to participate in Respondent's strike. The Acting General Counsel's brief also identifies the statements which underlie the allegations raised in complaint subparagraphs 6(a)(2) and (b), respectively:

> Respondent also violated the Act by its failure to disavow the Dominguez threat to Bill Spike that Lisa Pacheco Estrada would give Spike two black eyes if he crossed the picket line . . . Respondent further violated the Act by its failure to disavow the Geurs threat to bomb with "Molotov Cocktails" employees who crossed the picket line.

To summarize, based on the Acting General Counsel's brief, quoted above, I conclude that complaint subparagraph 6(a)(1), which alleges that Respondent "threatened employees with less

favorable representation because employees refused to participate in Respondent's strike," refers to a comment posted by Wade Zimmerman: "THINK that the union will protect you. They may have to represent you, but will they give it 100%." Additionally, based on the Acting General Counsel's brief, I conclude that complaint subparagraph 6(a)(2), alleging that Respondent "threatened employees with physical harm because employees refused to participate in Respondent's strike," refers to this comment posted by Joaquin Dominguez: "If u cross bill you will lose your eyesight but from the 2 black eyes Lisa is gonna give u lol." Further, I conclude that complaint subparagraph 6(b), which alleges that Respondent "threatened employees with violence by the use of explosives," refers to a comment posted by Patrick Geurs: "Can we bring the Molotov Cocktails this time?"

Although the complaint includes a paragraph alleging certain individuals to be Respondent's agents, Guers, Zimmerman, and Dominguez are not among them. Clearly, the Government does not rely on an agency theory in seeking to hold Respondent liable for the statements of these three.

Rather, as the Acting General Counsel's brief, quoted above, makes clear, the Government argues that Respondent had a duty to disavow these statements posted on its Facebook page, and failed to do so. Citing case law for the proposition that a union becomes responsible for the acts of its pickets on a picket line when the union fails to take corrective action or disavow the actions, the Acting General Counsel argues that "Respondent is liable for the Zimmerman post because [Respondent's Facebook page] is an electronic extension of Respondent's picket line."

To the contrary, I conclude that Respondent's Facebook page is in no way "an electronic extension" of its picket line. Initially, it may be noted that the Facebook page existed well before the picket line. Indeed, complaint subparagraphs 6(a)(1) and (2), as amended, allege that Respondent violated the Act because of postings on this Facebook page in January 2012, some 2 months before the strike. Thus, the Facebook page did not grow out of the strike.

Moreover, a picket line serves a purpose quite distinct from that of the Facebook page. A picket line proclaims to the public, in a highly visible way, that the striking union has a dispute with the employer, and thus seeks to enlist the public in its effort to place economic pressure on the employer. The picket signs notify sympathetic members of the public not to purchase the employer's goods or services. The picket line also signals to employees—both employees of the struck employer and, in certain instances, employees of other employers—that there is a labor dispute, to the end that these employees will not cross the picket line but instead will withhold their services. Thus, a picket line makes visible in geographic space the confrontation between the two sides.

In contrast, Respondent's Facebook page does not serve to communicate a message to the public. To the contrary, it is private. Moreover, it does not draw any line in the sand or on the sidewalk.

Unlike a website in cyberspace, an actual picket line confronts employees reporting for work with a stark and unavoidable choice: To cross or not to cross. Should someone acting as a union's agent make a threat while on the picket line, the coercive effect is immediate and unattenuated because it falls on the ears of an employee who, at that very moment, must make a decision concerning the exercise of his Section 7 rights.

Considering the marked differences, the Respondent's Facebook page certainly does not amount to an extension of Respondent's picket line and was not created for that purpose. Respondent's vice president, Cornelius, fashioned the website to be a forum for the sort of unfettered, candid discussion which typifies the Internet. Thousands, perhaps hundreds of thousands of other websites host such robust discussions without creating the impression that all the comments posted express the opinions of the host. The Acting General Counsel's theory, that Respondent has a duty to disavow opinions posted by others, would impose a substantial burden on the free speech rights of this one type of organization, a burden not borne by others on the Internet.

It also concerns me that the Government should argue that Respondent had a duty to disavow because requiring anyone to disavow *someone else's* statement amounts to compelled speech and deeply implicates the First Amendment, which protects not only the right to speak but also the right to refrain from speaking. See, e.g., *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Wooley v. Maynard*, 430 U.S. 705 (1977).

Imposing a duty to disavow someone else's speech also would push the Board's remedial authority to the edge of the envelope and perhaps beyond. When a respondent threatens an employee in violation of Section 8(b)(1)(A) or (a)(1) of the Act, the threatening words are the deed itself. They are as much a part of the deed as teeth are part of the bite, and only by pulling them can the coercive effect be neutralized. So, the Board's remedial authority does include the power to order a respondent to retract its own unlawful words, just as it includes the power to order a respondent to undo an unlawful discharge it effected and to pay backpay. However, that is quite different from ordering someone to disavow a threat he did not make and for which he is not responsible.

Although no party has raised Section 230 of the Communications Decency Act of 1996, justice requires that it be considered sua sponte. A Federal agency must know Federal law and give it effect. Section 230 states, in part: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided. . . ." 47 U.S.C. § 230(c)(1). It further provides that the "term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

Court decisions interpreting and applying these provisions often have related to civil defamation claims. See, e.g., *Austin v. CrystalTech Web Hosting*, 125 P.3d 389 (Ariz.Ct.App. 2005); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (statute barred an action alleging negligent online publication of defamatory material). However, the statutory lan-

guage quoted above applies in other contexts as well. Here, it precludes treating Respondent "as the publisher or speaker of" the comments posted by Guers, Zimmerman, and Dominguez.

Because merely posting these comments on Respondent's Facebook page does not make Respondent the publisher or speaker of them, it follows that Respondent had no duty to disavow them. To hold otherwise would compel speech. Although the Board has power to require a respondent to retract an unlawful threat which the respondent itself made, such a speaker's duty to retract arises only because the speaker had made the unlawful statement and was responsible for remedying the harm it caused.

Additionally, because Respondent is not "the publisher or speaker of" the comments posted by Guers, Zimmerman, and Dominguez, I need not examine whether those statements would have violated Section 8(b)(1)(A) if they had, in fact, been made by Respondent. Of course, neither Guers, Zimmerman, nor Dominguez is a respondent in this proceeding, and the Government has not alleged that any of them is a labor organization within the meaning of Section 2(5) of the Act.

Moreover, because the complaint does not allege that Guers, Zimmerman, and Dominguez possessed either real or apparent authority to speak on Respondent's behalf, I need not and do not consider whether they were Respondent's agents and make no findings in that regard. However, even apart from Section 230 of the Communications Decency Act of 1996, I do not believe that any reasonable person reading the comments posted by Guers, Zimmerman, and Dominguez would mistake them for the Respondent's own pronouncements.

Respondent used its Facebook page to create a forum for free discussion. It had just as much right to do so as any other person, enterprise, or organization. Anyone familiar with the Internet would recognize immediately that such a forum welcomes robust and unfettered discussion—some might call it "no holds barred discussion"—and would not reasonably assume that the views expressed by posters necessarily were those of the host.

For these reasons, I recommend that the Board dismiss the unfair labor practice allegations arising from complaint subparagraphs 6(a)(1), (2), and (b).

Complaint Subparagraph 6(c)

Complaint subparagraph 6(c) concerns statements allegedly made by Respondent's vice president, Michael Cornelius, on May 20, 2012, at the Union's monthly membership meeting in Phoenix. It alleges that Respondent, by Cornelius (1) threatened employees with bodily injury for refusing to participate in Respondent's strike against the Employer, and (2) threatened employees with unspecified retaliation because they cooperated with the National Labor Relations Board in the investigation of an unfair labor practice charge against Respondent. Complaint paragraph 7 alleges that this conduct violated Section 8(b)(1)(A) of the Act. Respondent denies these allegations.

The Acting General Counsel's post hearing brief identifies more precisely the conduct alleged in complaint subparagraph 6(c). The brief states, in part, as follows:

> During Respondent's monthly membership meeting on May 20, 2012, Cornelius expressed to Respondent's members Respondent's opinion that the unfair labor practice charge filed by Weigand against Respondent on April 6, 2012 completely lacked merit. Cornelius then explained to the attendees that the NLRB agent in charge of the investigation had requested Respondent to provide the NLRB with copies of posts on [Respondent's Facebook page]. Cornelius also informed the membership that someone had printed out copies of posts on [Respondent's Facebook page] and handed them to Weigand, who in turn had submitted the posts to the NLRB.

During the May membership meeting, Cornelius made the following threats:

> I'm not giving them access to our Facebook page. I will take it down and I will deactivate it before that happens. I gave you guys that page so that you can have the ability to talk amongst yourselves, free of anybody else—in my opinion, you have to have a reasonable expectation of privacy on that page. You have to believe that you could speak freely on there, that I'm not going to judge you based on what you said, that somebody's not going to go file a charge against you for what you say on there. To me, it is a private page and if anybody in here is the one who shared what was on that page, I think you should be ashamed of yourself. Whoever did it should be ashamed of themselves. There's really no merit to his case. First of all, it's—the only thing that he has any evidence to is the grievances. We post grievance reports to show we're processing a grievance.

At the very least, a threat must refer in some way to some unwanted action to be taken or some adverse consequence to be inflicted if the threatened person does not act or refrain from acting in a certain manner. To be a "threat," a statement need not identify the specific reprisal contemplated, but a statement which does not convey any notion of reprisal or force can hardly be called "threatening." However, I can find nothing in the material quoted above which suggests any kind of reprisal or which indicates that the speaker contemplated any retaliatory action. Cornelius' words do not, or at least do not in any way obvious to me, match the language in either complaint subparagraphs 6(c)(1) or (2).

In considering the Government's arguments, I will follow the order they appear it the Acting General Counsel's brief and begin with those related to complaint subparagraph 6(c)(2). The Acting General Counsel offers the following argument concerning why Cornelius' words constitute an unlawful threat:

> In the context of Cornelius's expression to the membership that a member provided copies of [Respondent's Facebook page] posts to [Charging Party] Weigand, who in turn provided them to the NLRB, Cornelius's admonition to its members—that whomever provided Weigand with copies of the posts should be "ashamed" of himself and themselves—is a coercive threat because it equated members' cooperation in the pending NLRB investigation of Weigand's unfair labor practice charge against Respondent with unfavorable repercussions. See *Auto Workers Local 235 (General Motors Corp.)*, 313 NLRB 36, 41 (1993) (publicly humiliating union

member at union meeting because member had testified at NLRB trial unlawful).

Thus, the allegation in complaint subparagraph 6(c)(2), that Respondent "threatened employees with unspecified retaliation," boils down to the claim that Cornelius violated the Act by saying that "whomever provided Weigand with copies of the posts should be 'ashamed' of himself and themselves. . . ." Although the brief uses the words "unfavorable repercussions," it does not explain how any of Cornelius' words mentioned or even alluded to the possibility of retaliation. They don't. To call Cornelius' words a violative "threat" requires imagination untethered to the case law.

Moreover, the cited *Auto Workers Local 235* case is inapposite. In that case, the official presiding at a union meeting had excoriated a specific member for filing an unfair labor practice charge resulting in the union spending money to defend itself. When the union member tried to reply, the official told him to sit down or be thrown out. Nothing like that happened in the present case. Cornelius did not identify any person, and did not single anyone out for rude or abusive treatment.

The test of whether a statement would reasonably tend to coerce an employee in the exercise of protected concerted activities is an objective one, requiring an assessment of all the circumstances in which the statement is made. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). Applying such a standard, and considering all the circumstances surrounding the statement, I conclude that what Cornelius said would not reasonably tend to coerce an employee in the exercise of protected concerted activities.

Complaint subparagraph 6(c)(1) alleges that, at this same May 20, 2012 meeting, Respondent threatened employees with bodily injury for refusing to participate in the strike. The Acting General Counsel's brief explains this allegation as follows:

> Respondent further violated the Act at the same May 20, 2012 membership meeting when Cornelius told the members present that he approved of members who threatened on [Respondent's Facebook page] to beat up employees who crossed the picket line:
>
> > Just like what was said in here. It is reasonable to say that if I say that the person crossed the line, and is a piece of crap, and I would love nothing more than to beat him up, although I'm not going to, but you're bitching about it, a lot of people use that to vent, and you should feel free to say that, and the day that you lose that belief that it is no longer private, I'm deleting it, because you have to know that it's private.
>
> In essence, Cornelius condoned his own and members' use of [Respondent's Facebook page] to threaten physical harm to employees who crossed the picket line. An equivalent scenario would be if Cornelius announced, with or without a wink, to members at Respondent's membership meeting that although he thought that it should be okay to beat up members who crossed the picket line, he himself would not do it. Cornelius' forced reservation that he would not engage in the conduct that he is recommending does not temper the coerciveness of his threat of physical violence. Furthermore, the degree of coerciveness of Cornelius' threat is increased because he is advocating that it should be appropriate for himself, Respondent's Vice President or Financial Secretary, to threaten bodily harm on [Respondent's Facebook page] to employees who crossed Respondent's picket line.

Applying an objective standard, I cannot conclude that any reasonable person would understand Cornelius' statement in the way the Acting General Counsel contends. The Government's reasoning assumes the fact it must prove. Indeed, the following sentence rests on more than one such unsupported assumption: "Cornelius' forced reservation that he would not engage in the conduct that he is recommending does not temper the coerciveness of his threat of physical violence."

Considering all the circumstances and Cornelius' statement as a whole, no reasonable listener would conclude that he was recommending violent conduct or that he had made a "threat of physical violence." Equally unsupported is the assertion that Cornelius was "advocating that it should be appropriate for himself . . . to threaten bodily harm. . . ." It is true that Cornelius said that he would "love nothing more than to beat him up, although I'm not going to," but at most, that statement only admits that Cornelius might take pleasure in such a violent act. It certainly does not amount to "advocating that it would be appropriate" for him to do so.

A reasonable listener would recognize the difference between a statement which admits a strong emotion and a statement indicating that a speaker considered it appropriate to act on the emotion or intended to do so. Neither Cornelius' words alone, nor the total context in which he spoke them, affords reason to believe he would translate the emotion into action.

Perhaps in certain circumstances, a reasonable person would be placed in fear by a speaker's admission of anger. Those circumstances might include the speaker's posture, demeanor and tone of voice, and whether there were any past instances in which the same speaker had lost his temper. The record reveals no such circumstances. A listener would have no reason to believe that Cornelius' statement meant anything other than the face value of the words Cornelius said, and those words specifically stated, "I'm not going to."

Moreover, the Board has found far harsher comments not to constitute a violation of Section 8(b)(1)(A). See, e.g., *Letter Carriers Local 3825 (Postal Service)*, 333 NLRB 343 (2001). Additionally, if Cornelius' expression of emotion was not an unfair labor practice, neither was his encouraging others to be similarly frank.

In sum, I conclude that Cornelius' statements at the May 20, 2012 meeting did not violate Section 8(b)(1)(A). Therefore, I recommend that the Board dismiss the allegations raised by complaint subparagraph 6(c).

Complaint Subparagraph 6(d)

Complaint subparagraph 6(d) alleges that sometime in mid-March 2012, Respondent, by Dennis Paulson, Arturo Suastegui, and Michael Riley, threatened employees with less favorable representation because employees refused to participate in Respondent's strike against the Employer. Paulson, Suastegui, and Riley are members of Respondent's executive board and

were "strike team leaders." The complaint alleges that they made such threats at the Employer's "North Garage" facility in Phoenix. Respondent has denied the allegations.

To establish these allegations, the Government relies, in part, on the testimony of Cynthia Bowden, a busdriver in the bargaining unit who chose to cross the picket line and work. She testified that during the strike, in mid-March 2012, as she was pulling her bus out of the Employer's facility, she saw Dennis Paulson on the picket line:

> He was saying something to the effect of, "You still have time, park the bus, come join us. If you continue, we won't be able to represent you, help you." That was about it. And then just the screams of, you know, scab and stuff like that.

She also testified that on a different occasion, about a week after the strike ended, she saw Paulson speaking with other employees in the dispatch area of the Employer's North Garage facility. According to Bowden, she overheard Paulson tell the other employees, "We won't represent the scabs."

Based upon my observations of the witnesses, I conclude that Bowden testified truthfully to the best of her recollection. Because of her demeanor as a witness, I conclude that her testimony is reliable. To the extent Bowden's testimony conflicts with that given by any other witness, I credit Bowden.

The Government also relies on the testimony of Charging Party Weigand, who also crossed the picket line and worked during the strike. He testified that as he was driving into the Employer's parking lot during the strike, he saw Paulson on the picket line. Weigand testified that Paulson "said something to the effect that we would not be covered—or represented, I should say, by the Union. If we get in trouble—again, I'm paraphrasing, but you get the meaning that if we get in trouble, they weren't going to represent us."

Based on my observations of Weigand's demeanor as a witness, I conclude that his testimony is credible. To the extent that it conflicts with that of other witnesses, I credit Weigand.

Busdriver George Martinek testified that he worked during the strike and described an occasion when Paulson was on the picket line with a bullhorn. According to Martinek, he was about 10 feet away from Paulson when Paulson, using the bullhorn, said, "Put back the bus. Come join us on the line. We'll forget that you tried to come to work. The Union won't protect you,"

Martinek also testified that, during the strike, Respondent's executive board member, Michael Riley, on the picket line, similarly said, "The Union's not going to protect you. Put back the bus and join us on the line." According to Martinek, Riley was not using a bullhorn when he made that statement, but Martinek estimated that Riley had been less than 10 feet away.

According to Martinek, another member of Respondent's executive board, Arturo Suastegui, made similar comments on the picket line: "Arturo was standing a few feet further back from Michael Riley and yelling, 'Put back the bus. Do not go against the Union, then we'll protect you.'"

Martinek also described a statement made by Suastegui about 5 days after the strike. Martinek testified that Suastegui was in the dispatch area of the Employer's facility and that about 12 other bargaining unit employees were also in the area:

> Q. What is it that you heard Arturo say?
>
> A. Just before he said, "The Union will not represent any of the scabs," they were talking about how the Union will not protect him and, "Let's hand out the old contract to him. Let' not talk to him."
>
> Q. Was Arturo directing any of that toward you?
>
> A. No.
>
> Q. Approximately how far away from you was Arturo when you heard him say—make these comments?
>
> A. Five feet away.

Another witness, Hayden Scheider, also testified that Paulson told nonstriking employees, "We don't have to represent you. We're not going to represent you." This corroboration buttresses my conclusion that the testimony of Bowden and Weigand should be credited.

Paulson and Suastegui denied the statements attributed to them by Bowden, Weigand, and Martinek. (Paulson, however, did admit using a megaphone to shout obscenities at the employees who crossed the picket line.) Riley did not testify.

To the extent that the testimony of Paulson and Suastegui conflicts with that of Bowden and Weigand, I have credited Bowden and Weigand for the reasons discussed above. Likewise, from Martinek's demeanor as a witness, I conclude that his testimony should be credited over that of Paulson and Suastegui.

Having found that Paulson, Riley, and Suastegui made the statements attributed to them, I must determine whether those statements should be imputed to Respondent. The answer to that question depends on whether they are the Respondent's agents within the meaning of Section 2(13) of the Act, which Respondent denies.

Paulson was elected to Respondent's executive board in January 2012, after having served as a union steward for about 1-1/2 years. There is an apparent inconsistency in the testimony Paulson gave regarding his duties as executive board member, and this conflict within his testimony gives me further reason to doubt its reliability.

Near the beginning of his testimony, on direct examination, Paulson said that he had not represented bargaining unit employees in grievance proceedings: "No, I don't even know how to do one." However, Paulson's testimony on cross-examination indicates that he is deeply involved in such matters:

> Q. Mr. Paulson, as an executive board officer, you receive money for expenses from the Union, is that correct?
>
> A. I don't get what you're saying.
>
> Q. Okay. You, the Union pays some of your expenses as an executive board officer, correct?
>
> A. No, not that I'm aware of.
>
> Q. Do you receive any payment of any sort from the Union?
>
> A. When I do, if I have to do something.
>
> Q. Okay. For example—
>
> A. If it's Union business.
>
> Q. Yes, and I'm referring to Union business. For example, what, what are some of the common things that

you do as an executive officer where you'll be reimbursed by the Union for it?

A. If I have to do a hearing on, during my run and I have to go and do a hearing, someone has to pay me.

Q. And when you say, "Do a hearing," you mean represent—

A. Basically the same thing that you're doing, but I'm doing it to them.

Q. Right. So you're, you're representing an individual who has been accused of some wrong doing by the Company, is that right?

A. Yes.

Q. Okay. And usually how long are those hearings?

A. It can go for ten minutes, it can go for hours.

Q. Okay. And what do you get, what do you get paid for or how much do you get paid for representing individuals at those hearings?

A. I get my run time.

Q. And what is that?

A.Whatever, however long is what I get paid for.

Q. Okay. So you get paid the same amount as if you were doing your normal job?

A. Yes.

Paulson's testimony that he represents employees in hearings that can last 10 minutes or "can go for hours," appears difficult to reconcile with the testimony he volunteered when asked about his role in grievance processing: "I don't even know how to do one." This seeming inconsistency raises some doubt about the reliability of other parts of his testimony. Moreover, Paulson's "don't even know how to do one" claim is somewhat hard to accept at face value considering that Paulson served as a union steward for 1-1/2years before being elected to the executive board.

Additionally, in the testimony excerpted above, when asked if Respondent paid some of his expenses, Paulson answered, "Not that I'm aware of." Latter in the cross-examination, Paulson gave the following testimony:

Q. Mr. Paulson, do you get, do you get paid an amount equal to Union dues each month, don't you?

A. Like a reimbursement?

Q. Yes.

A. Yes.

Q. So you pay dues, but the Union reimburses you for those dues?

A. Not the full amount though.

Q. What amount?

A. I have $55. I get about $46.

Q. $46 back?

A. Yeah.

Q. And that's every month?

A. Yeah.

Q. And was that the case between January and March of 2012?

A. I believe so.

It is quite possible that Paulson did not regard this monthly reimbursement as "expenses," which would explain why he answered that he was not aware of receiving any payment from Respondent for expenses. In any event, it is clear that Paulson did receive some remuneration from Respondent for his service as an executive board member.

In addition to representing employees accused of wrongdoing, Paulson's service as an executive board member also included dealing with the Employer's scheduler, who decided which bargaining unit employees would be assigned to drive which routes. Employees had the contractual right to bid on at least some of these assignments. Each week, Paulson took these bids to the scheduler.

Paulson also had certain duties associated with the strike. At the inception of the strike, Paulson called between 50 and 100 union members to inform them of the strike and encourage them to participate in picketing. Paulson testified that on the picket line itself he would "[j]ust get people motivated for doing the strike, picket back and forth, you know, chant a little bit, whatever. And then I usually go sit down."

The Board applies an objective standard in determining whether an individual is an agent. The same basic standard applies whether the principal is an employer or a union. In deciding whether someone is an agent for an employer, the Board asks whether the alleged agent's position and duties, and the context in which the conduct occurs, establish that employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Albertson's, Inc.*, 344 NLRB 1172 (2005). When the principal is a labor organization, the analogous test is whether the putative agent's position and duties, and the context of the conduct, would create the reasonable belief that the individual was reflecting union policy and speaking and acting for the union.

In *Teamsters Local 705 (Pennsylvania Truck Lines)*, 314 NLRB 95, 95 at fn. 1 (1994), the Board found that a steward was the union's agent where the steward informed new employees about union dues and fees, obtained dues checkoff and initiation forms from new employees, settled disputes before the grievance stage, and, during the strike, supervised the picketing, kept picketing schedules and lists of the picketing employees, and informed employees that they were supposed to picket on their regular shifts.

In the present case, Paulson's picketing-related duties were not so comprehensive as those of the steward in *Teamsters Local 705*, supra, but he was extensively involved in representing employees accused of wrong-doing. Unlike the steward in *Teamsters Local 705*, who resolved problems at the pregrievance stage, Paulson actually represented employees at hearings. Therefore, I conclude that employees reasonably would believe that he was speaking and acting for the Respondent when he said that Respondent would not represent employees who did not go on strike. In this regard, Paulson's past service representing employees gave his "won't represent" statements particular credence.

Moreover, in determining whether employees reasonably would believe that someone is speaking or acting as an agent for someone else, the Board considers all the circumstances from the perspective of the employees. Doing so leads me to

conclude that those who heard Paulson's remarks reasonably would believe he was speaking for the Union. See *Teamsters Local 886 (United Parcel Service)*, 354 NLRB 370 (2009).

Further, I conclude that Paulson's statement restrained and coerced employees in violation of Section 8(b)(1)(A). The Board has held it unlawful for a union to inform employees that it will not represent them in grievance proceedings unless they are members. *American Postal Workers (Postal Service)*, 310 NLRB 599 (1993). Just as Section 7 of the Act protects employees' rights to refrain from union membership, it also protects their right to refrain from union activity, which includes a strike.

The testimony of Arturo Suastegui establishes that he, too, is a member of Respondent's executive board and previously served as one of Respondent's stewards. His duties as an executive board member are very similar to Paulson's, and include representing employees in hearings. For the same reasons discussed above with respect to Paulson, I conclude that employees reasonably would believe that Suastegui was speaking for Respondent when he communicated that Respondent would not represent those who did not participate in the strike.

Michael Riley did not testify. Although the record indicates that he also was a member of Respondent's executive board, it does not establish the extent of his duties related to the representation of bargaining unit employees. Based on the present record, I conclude that the Government has not established that Riley was an agent with real or apparent authority to speak on behalf of the Respondent. (In that regard, I also conclude that the record does not prove the agency status of James Washington, Dwayne Handy, and Sebastran Aldama, also alleged by the complaint, as amended, to be Respondent's agents.) However, the statements of Paulson and Suastegui suffice to establish the violation alleged in complaint subparagraph 6(d).

Respondent argues that Paulson's statements were de minimus and that its subsequent actions demonstrate that it was, in fact, willing to represent all employees regardless of whether they participated in the 6-day strike. However, requiring Respondent to post a notice acknowledging that it will represent all employees without regard to their protected activities certainly would serve to dispel any lingering doubt that Respondent would do so.

REMEDY

Having found that Respondent violated Section 8(b)(1)(A) of the Act, I recommend that the Board order it to cease and desist, and to post the notice to members set forth in the Appendix.

CONCLUSIONS OF LAW

1. The Respondent, Amalgamated Transit Union, Local Union No. 1433, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act, and an exclusive representative, within the meaning of Section 9(a) of the Act, of a unit of employees of Veolia Transportation Services, Inc. Phoenix Division, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent restrained and coerced employees in the bargaining unit described above in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act, by threatening that employees who failed to participate in its strike against the Employer would receive less favorable representation.

3. Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, Amalgamated Transit Union, Local Union No. 1433, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining and coercing employees in the exercise of rights protected by Section 7 of the Act by informing employees that they will receive less favorable representation because they exercised their right to refrain from participating in a strike.

(b) In any like or related manner restraining or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

(c) In any like or related manner restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide fair and equal representation to all employees in the bargaining unit we represent regardless of whether they engaged in or refrained from activities protected by Section 7 of the Act.

(b) Within 14 days after service by the Region, post at its facilities in Phoenix, Arizona, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

Dated Washington, D.C. November 28, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT restrain or coerce employees in the bargaining unit we represent in the exercise of these rights, guaranteed to them by Section 7 of the Act.

WE WILL NOT inform employees in the bargaining unit we represent that they will receive less favorable representation because they refrained from participating in a strike or from engaging in any other union or protected, concerted activity.

WE WILL NOT in any like or related manner restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL provide fair and equal representation to all employees in the bargaining unit we represent regardless of whether they engaged in or refrained from activities protected by Section 7 of the Act.

AMALGAMATED TRANSIT UNION, LOCAL UNION NO. 1433, AFL–CIO